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No. 01-1786

In the Supreme Court of the United States

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS D/B/A SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION,

Petitioner,

v.

ERNEST I. YOUNG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

This case involves a dispute over a failed joint venture to expand an automotive parts manufacturing company. In late 1994 and early 1995, Respondent Ernest, I. Young ("Young"), and Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission ("the EDC"), entered into a series of agreements to form the joint venture, including a Joint Venture Master Agreement ("JVMA") and an Employment Agreement. Both the JVMA and the Employment Agreement contained provisions requiring Young's employment by the joint venture for a fixed period at a fixed minimum compensation rate. The JVMA also include an arbitration clause and an express waiver of sovereign immunity in which the EDC waived its immunity with regard to any suit to enforce the provisions of the JVMA and all other agreements executed and delivered at the closing, including the Employment Agreement.

The petition raises the following issues:

I. Did the Michigan courts err when they rejected the EDC's claims of sovereign immunity where the EDC expressly waived its immunity with regard to suits to enforce the provisions of the JVMA and all other agreements executed and delivered at the closing; where the Employment Agreement was one of the agreements executed and delivered at the closing; where the key terms of the Employment Agreement were expressly set forth in the JVMA; and where the Employment Agreement incorporated by reference all of the applicable provisions of the JVMA?

II. Did the Michigan Court of Appeals err when it awarded statutory judgment interest to Young where the parties agreed that their dispute would be resolved by application of Michigan law and Michigan law expressly provides for the award of statutory judgment interest?

Respondent Young objects to the "larger question" identified in the petition. Petitioner attempts to style this case as one involving state court encroachment on federal law governing Indian sovereign immunity. In reality, however, this case involves an almost purely factual dispute concerning the interpretation and application of contractual language between two parties acting in commercial capacities. The "larger question" posed in the petition was neither raised nor addressed in the lower court proceedings.

RULE 29.6 STATEMENT

Respondent Ernest I. Young has no corporate affiliations. Petitioner provided their statement in the Petition for Writ of Certiorari

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COUNTER-STATEMENT OF THE CASE

In the Petition for Writ of Certiorari, the EDC sets forth an incomplete recitation of facts. Because Young believes the dispute in this case is almost purely factual, a more complete recitation of the relevant facts follows.

I. The Formation of the Joint Venture.

In 1974, Respondent Ernest I. Young formed Special Plastic Products, Inc. ("SPP, Inc."), a manufacturer of injection molded plastic products, primarily for sale to the automotive industry. During the 20-year period between 1974 and 1994, Young built SPP, Inc. into an enterprise with annual sales of approximately $9 million.

In 1994, Young and SPP, Inc. entered into negotiations with Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission ("the EDC"), to form a joint venture. The joint venture was to consist of three companies. Special Plastic Products, L.L.C. ("SPPLLC") would be formed to continue and expand upon the manufacturing operations of SPP, Inc. Two additional companies would also be formed, one to own the real property of the joint venture, and the other to perform engineering services for SPPLLC.

II. The Joint Venture Master Agreement.

By late 1994, the parties had negotiated an acceptable deal, and on December 15, 1994, they entered into a Joint

Venture Master Agreement ("JVMA"). The JVMA contained four key provisions which are relevant to this case. First, the JVMA required that Young be employed as the Chief Executive Officer of the joint venture companies:

> **9. Implementation.** The promises and agreements of the parties are further conditioned upon and subject to the terms and provisions of the following documents to be executed and delivered at Closing:
>
> . . .
>
> **B. Young Employment Agreement.** Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of $145,000 per year plus benefits, bonus of 2% for gross sales exceeding $12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.[1]

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[1] Contrary to the EDC's assertion, the JVMA did not merely "contemplate" that Young would be hired by the joint venture companies. Rather, by its own language, the JVMA expressly provided that it would be "subject to the terms" of the Employment Agreement. Young's employment was mandatory ("Young shall be employed . . ."), and was a condition precedent to the entire joint venture.

(*See*, App. to Br. in Opp. pp.3b-4b).

Next, the JVMA included a provision requiring any disputes arising out of or relating to the joint venture to be submitted to binding arbitration:

> **14.2 Arbitration.**
>
> (a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction. . . .

(App. to Br. in Opp. pp. 5b-6b).

The JVMA also included an express waiver of the EDC's sovereign immunity with regard to any disputes between the parties relating to the joint venture:

> **14.3 Waiver of Sovereign Immunity and Consent to Suit.** The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement,

and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

(a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the Companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1).

(App. to Br. in Opp. pp. 6b-7b).

Finally, the JVMA included an "interpretation" clause which instructed that the JVMA was to be construed in light of the other joint venture agreements:

> **20.7 Interpretation.** This is the entire agreement with respect to its subject matter, except for those Agreements expressly referenced herein. All prior and contemporaneous representations are merged herein. Terms used shall be in the singular or plural where appropriate.

(App. to Br. in Opp. p. 7b).

III. The Employment Agreement.

On approximately January 15, 1995, the parties entered into a series of additional agreements relating to the joint venture. Key among these was the Employment Agreement, pursuant to which Young was hired as the Chief Executive Officer of the joint venture companies. In addition to setting forth Young's duties and compensation, the Employment Agreement included two provisions addressing the relationship between the Employment Agreement and the JVMA:

> **13.5 Incorporation.** This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement. This Agreement does not supersede, replace or abrogate any provision of the Joint Venture Master Agreement or any other document executed as part of the transaction governed by the Joint Venture Master Agreement. Any

inconsistency between this Agreement and any other such document as to any facet of Young's employment by the Company, SPELLC, and NABGLLC shall be governed by this Agreement. All provisions of the Joint Venture Master Agreement and other documents executed as part of the transaction governed by the Joint Venture Master Agreement survive execution of this Agreement.

13.6 Entire Agreement. Except for those documents referred to in Section 13.6 [sic] or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. All prior agreements, statements, or representations between the parties and their agents and/or employees, whether written or oral, are expressly merged herein and, if not contained in this Agreement, are of no force and effect. This Agreement shall not be modified, changed, altered, or discharged whatsoever, except by an agreement in writing executed by all parties hereto.

(App. to Br. in Opp. pp. 20b-21b).

The Employment Agreement was signed by Young on the one hand, and by a Tribal official on the other hand. (App. to Br. in Opp. pp. 22b-23b).

IV. The Failure of the Joint Venture.

In the months following the formation of the joint venture, Young successfully procured an automotive parts production program from General Motors that would result in up to $40 million in additional annual sales for SPPLLC. In order to produce the parts, however, it would be necessary for the joint venture to rapidly complete the expansion contemplated in the JVMA.

By early 1996 the joint venture was experiencing financial difficulties as a result of the expansion. In February 1996, through a series of questionable maneuvers, the EDC gained control of the management boards of each of the joint venture companies. Young was soon replaced as chairman of the management boards by Bernard Bouschor, the Sault Ste. Marie Tribal Chairman, who had little or no experience in the automotive industry. Young was also subsequently stripped of a significant portion of his day-to-day management authority.

In September 1996, while the company continued to struggle under the EDC's control, Young's employment was terminated. The termination letter was printed on Tribal stationery and was signed by the Tribal Chairman. (App. to Br. in Opp. pp. 24b-25b).

By April 1997, the joint venture was out of business, and the EDC had sold all of the remaining assets of SPPLLC. In less than two years the EDC had destroyed the company Young spent 20 years building.

V. The Arbitration.

In October 1996, Young and SPP, Inc. filed a demand for arbitration pursuant to the terms of the JVMA. On January 13, 1998, Young and SPP, Inc. filed their First Amended Arbitration Claim. Among other things, Young and SPP, Inc. requested an award of damages against all of the respondents in the arbitration, including the EDC, for breach of the JVMA and breach of the Employment Agreement.

An arbitration hearing was conducted on January 21, 22, 23 and February 4, 1998. On the first day of the hearing, Young and SPP, Inc. submitted their arbitration brief which included more than seven pages of argument, as well as numerous exhibits, in support of their contention that the EDC should be held liable for breaching the Employment Agreement. (App. to Br. in Opp. pp. 26b-36b). The EDC responded with its own arbitration brief, in which it specifically addressed its liability relating to the Employment Agreement. (App. to Br. in Opp. pp. 37b-39b). Several weeks after the hearing, the EDC also submitted a closing brief in which it once again addressed its liability under the Employment Agreement. (App. to Br. in Opp. pp. 40b-43b).

On April 10, 1998, the arbitrators issued their Award of Arbitrators. The arbitrators found that the EDC and SPPLLC were liable to Young for breach of the Employment Agreement and awarded Young damages in the amount of $546,351.33.[2] (App. to Br. in Opp. pp. 44b-46b).

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[2] The arbitrators found no cause for action with regard to Young's claim for breach of the JVMA and the SPPLLC Operating Agreement. The arbitrators also found no cause for action on the EDC's counterclaim seeking to recoup its entire

VI. The Oakland County Circuit Court Confirms the Arbitration Award in a Judgment, but Refuses to Award Statutory Interest to Young.

In the months after the arbitration award was issued, Young and the EDC filed a number of motions in the Oakland County (Michigan) Circuit Court. Young sought confirmation of the arbitration award in a judgment and requested an award of statutory judgment interest. The EDC, on the other hand, moved to vacate the arbitration award or to have it modified to delete the award of damages against the EDC for breach of the Employment Agreement.

At a hearing on July 22, 1998, the Oakland County Circuit Court rejected the EDC's arguments and ordered entry of a judgment confirming the award. In its oral ruling, the Circuit Court held that the EDC had unequivocally waived its sovereign immunity with regard to all of the agreements executed and delivered at the joint venture closing, including the Employment Agreement. (App. to Br. in Opp. pp. 55b-56b).

The Circuit Court also held that the EDC had agreed to arbitrate any claims arising out of or relating to the JVMA, that the Employment Agreement arose out of and related to the JVMA, and that the Employment Agreement was expressly included in the JVMA. Consequently, the Circuit Court held, the EDC had agreed to arbitrate any claims relating to the Employment Agreement. The Circuit Court also held that the arbitrators did not exceed their authority since Michigan law provided substantial legal support for the award. (App. to Br. in Opp. p. 56b).

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investment in the joint venture.

Finally, the Circuit Court declined Young's request for statutory judgment interest. On August 12, 1998, the Final Judgment Confirming Modified Award of Arbitrators was entered.[3]

VII. The Michigan Court of Appeals Affirms the Circuit Court's Confirmation of the Arbitration Award and Reverses the Ruling Regarding Statutory Interest.

On September 2, 1998, the EDC filed an appeal of right in the Michigan Court of Appeals. The EDC essentially raised the same arguments that had previously been rejected by the arbitrators and the Circuit Court. Young also filed a cross-appeal with regard to the statutory interest ruling.

Like the arbitrators and the Circuit Court, the Court of Appeals rejected the EDC's arguments. Recognizing that the JVMA stated that it would be "subject to the terms" of the Employment Agreement, and that Employment Agreement was one of the agreements executed and delivered at the closing referred to in the JVMA, the Court of Appeals held that the agreements should be construed together. Construing the agreements together, the Court of Appeals rejected the EDC's sovereign immunity argument. (App. to Br. in Opp. pp. 60b-66b).

The Court of Appeals further noted that since the parties had agreed that any disputes would be resolved by application of Michigan law, and since statutory judgment interest is mandatory under Michigan law, the Circuit Court

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[3] The Final Judgment also modified the Award of Arbitrators to correct a clerical error by the arbitrators.

erred by refusing to award statutory interest to Young. (App. to Br. in Opp. pp. 66b-70b).

VIII. The Michigan Supreme Court Denies the EDC's Application for Leave to Appeal.

Unsatisfied with the Court of Appeals ruling, the EDC filed an application for leave to appeal with the Michigan Supreme Court on June 11, 2001. On March 4, 2002, the Michigan Supreme Court entered an order denying the EDC's application. (App. to Br. in Opp. pp. 71b-72b). Shortly thereafter, the EDC filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

I. The EDC Has Failed to Articulate a Compelling Reason to Justify Discretionary Review by this Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

In its Petition, the EDC has failed to demonstrate any compelling reason for this Court to exercise its discretionary review in this case. Contrary to the EDC's assertions, this case does not involve any issues of critical importance to federal law and Indian sovereignty. Rather, this case involves what is essentially a factual dispute concerning the interpretation of a contract.

In the JVMA, the EDC waived its sovereign immunity not only with regard to the JVMA, but also with regard to all of the agreements executed and delivered at the closing. The Employment Agreement was one of the agreements executed and delivered at the closing, and its key terms were expressly set forth in the JVMA. Furthermore, by its own language, the JVMA specifically provided that it would be "subject to the terms" of the Employment Agreement. Based on these facts, the determination by the Michigan courts that the EDC waived its sovereign immunity with regard to the Employment Agreement can hardly be characterized as the type of error requiring intervention by this Court.

As if the EDC's express waiver of sovereign immunity weren't enough, the EDC also agreed to arbitrate any disputes arising out of or relating to the JVMA, and to allow entry of judgment in a Michigan court on any award rendered in such an arbitration. Based on this Court's recent decision in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), this agreement to arbitrate is sufficient to constitute an express waiver of the EDC's sovereign immunity. Because the Employment Agreement clearly arises out of or relates to the JVMA, Young's claim for breach of the Employment Agreement clearly came within the scope of the EDC's waiver. Accordingly, the Michigan courts did not err when they rejected the EDC's claim of sovereign immunity.

II. The EDC Clearly and Unequivocally Waived its Sovereign Immunity with Regard to Disputes Arising out of or Relating to the Joint Venture, Including Disputes Relating to the Employment Agreement.

Although the EDC attempts to style this case as one involving issues of state court encroachment on tribal sovereignty, the real issue in this case boils down to a simple question of contract interpretation: Did the EDC's waiver of sovereign immunity in the JVMA extend to disputes relating to the Employment Agreement? Three tribunals, the arbitrators, the Oakland County Circuit Court, and the Michigan Court of Appeals, have already determined that the EDC unequivocally waived its sovereign immunity. When the relevant agreements are examined, it becomes quite evident that those tribunals did not err.

A. The Employment Agreement Clearly Arises out of and Relates to the JVMA.

Section 20.7 of the JVMA, entitled "Interpretation", provides a logical starting point for the sovereign immunity analysis. The language of the interpretation clause makes it clear that the JVMA is not to be considered in isolation. The relevant language of the interpretation clause provides that the JVMA "is the entire agreement with respect to its subject matter, *except for those Agreements expressly referenced herein.*" (App. to Br. in Opp. p. 7b) (emphasis added).

Among the agreements expressly referenced in the JVMA is the Employment Agreement. In Section 9, the JVMA indicates that it will be "subject to the terms and provisions" of a number of agreements to be executed and

delivered at the closing, including, specifically, the Employment Agreement. The key terms of the Employment Agreement are also expressly set forth in Subsection 9.B.:

> Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of $145,000 per year plus benefits, bonus of 2% for gross sales exceeding $12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.

(App. to Br. in Opp. pp. 3b-4b).

The interrelationship between the JVMA and the Employment Agreement is further demonstrated by numerous provisions of the Employment Agreement. For instance, Section 13.5 of the Employment Agreement provides that it "is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." (App. to Br. in Opp. pp. 20b-21b).

Section 13.6, in turn, expressly incorporates all applicable provisions of the JVMA into the Employment Agreement: "Except for those documents referred to in Section 13.6 [sic] or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. . . ." (App. to Br. in Opp. p. 21b).

All of these provisions clearly demonstrate that not only was the Employment Agreement part of the JVMA, but the JVMA was part of the Employment Agreement. The JVMA and the Employment Agreement are so intertwined that the Michigan Court of Appeals properly held that they should "be construed as one agreement." (App. to Br. in Opp. pp. 64b-65b).

B. The EDC Explicitly Waived its Sovereign Immunity with Regard to All Agreements Executed and Delivered at the Closing, Including the Employment Agreement.

In Section 14.3 of the JVMA, the EDC expressly waived its immunity from suit "to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement . . . ." The EDC argues, however, that its waiver should be limited by Subsection 14.3(c), which states, " the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC[.]" The EDC contends this language limits its waiver to disputes relating solely to the JVMA.

If the EDC's proposed interpretation of Subsection 14.3(c) is accepted, the EDC's argument would nevertheless fail. As set forth above, the key provisions of the Employment Agreement are included in the express language of the JVMA, and by its express language, the JVMA was subject to the terms of the Employment Agreement. Thus, even if the waiver of sovereign immunity was limited to claims arising out of or relating to the JVMA, Young's claim

relating to the Employment Agreement would come within the scope of the EDC's waiver.

It should also come as no surprise that the Michigan courts rejected the arguments advanced by the EDC. Under Michigan contract law, courts are to avoid interpreting a contract in a manner that renders a portion of the agreement meaningless. *Burton v. Travelers Ins. Co.*, 341 Mich. 30, 32; 67 N.W.2d 54 (1954).[4] If the EDC's proposed interpretation were accepted, it would render the language extending the waiver of sovereign immunity to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement" completely meaningless.

There are several possible alternative interpretations of Subsection 14.3(c) that would avoid rendering a portion of the JVMA meaningless. For instance, Subsection 14.3(c) may have been intended to make it clear that the waiver of sovereign immunity was to be limited to the EDC, and was not to be extended to any of the other Sault Tribe entities. This construction would give Subsection 14.3(c) meaning, and would avoid rendering meaningless the language extending the waiver to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement".[5]

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[4] The JVMA and the Employment Agreement each provide that they are to be construed in accordance with Michigan law. (App. to Br. in Opp. pp. 7b, 21b).

[5] This is not necessarily the interpretation sought by Young. It is merely suggested to demonstrate that there are alternative interpretations available which, unlike the interpretation suggested by the EDC, avoid rendering other portions of the agreement meaningless.

On the other hand, even if the EDC's proposed interpretation was accepted, it would not be given any effect. Michigan contract law also provides that if an agreement contains conflicting clauses, the clause which appears first will be given effect, and the clause which appears later will be rejected. *Klever v. Klever*, 333 Mich. 179, 188; 52 N.W.2d 653 (1952). If the EDC's interpretation of Subsection 14.3(c) were accepted, it would directly conflict with the language extending the waiver to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement". Thus, it would not be given effect pursuant to Michigan contract law.

C. The EDC Waived its Sovereign Immunity by Agreeing to Arbitrate Any Claims Arising out of or Relating to the Joint Venture Master Agreement.

In addition to its explicit waiver of sovereign immunity, the EDC also waived its sovereign immunity by agreeing to arbitrate any disputes arising out of or relating to the JVMA. The arbitration provision of the JVMA provides in pertinent part as follows:

> (a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b),

> arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction. . . .

(App. to Br. in Opp. p. 5b).

In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), this Court addressed a dispute concerning the waiver of sovereign immunity in a case involving an arbitration clause very similar to the one set forth above. The arbitration clause in *C&L Enterprises* required the parties to a construction contract, including an Indian Tribe, to submit any disputes arising out of or relating to the contract to binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. *Id.* at 415. Both the arbitration clause and the applicable arbitration rules provided that judgment could be entered on an award rendered by arbitration in any court having jurisdiction. *Id.* Furthermore, Oklahoma, the state in which the dispute arose, had adopted a Uniform Arbitration Act that permitted entry of judgment on an arbitration award in any court having jurisdiction. *Id.* This Court ruled that by agreeing to resolve any disputes relating to the construction contract in this manner, the Indian tribe had waived its sovereign immunity.

Applying a similar analysis to the present case, it is clear that the EDC likewise waived its sovereign immunity. The arbitration clause in the JVMA provides for arbitration pursuant to the American Arbitration Association's commercial arbitration rules. The arbitration clause and the commercial arbitration rules both provide that judgment may be entered on an award in any court having jurisdiction. Like

Oklahoma, Michigan has adopted a Uniform Arbitration Act, Mich. Comp. Laws § 600.5001, et seq., that provides for entry of judgment on arbitration awards in Michigan's circuit courts.

By agreeing to resolve any disputes in this manner, the EDC, like the Indian tribe in *C&L Enterprises*, waived its sovereign immunity with regard to any disputes arising out of or relating to the JVMA. Because the Employment Agreement clearly arises out of and relates to the JVMA (its key terms are included in the JVMA), it is clear that the EDC also waived its sovereign immunity with regard to disputes arising out of or relating to the Employment Agreement.

D. The EDC Waived its Objections to Arbitrability by Participating in the Arbitration.

In addition to clearly waiving its sovereign immunity, the EDC also waived its right to object to the arbitration of the Employment Agreement claim by willingly participating in the arbitration of that claim. Under Michigan law, a party may not challenge the arbitrability of an issue after it has consented to and participated in arbitration of the issue:

> If a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue.

American Motorists Ins. Co. v. Llanes, 396 Mich. 113, 114-115; 240 N.W.2d 203 (1976) (citing *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability*, 33 A.L.R.3d 1242, 1244).

In the present case, Young's First Amended Arbitration Claim clearly set forth the claim for breach of the Employment Agreement against all of the respondents in the arbitration, including the EDC. Thereafter, the EDC voluntarily participated in the arbitration of the claim relating to the Employment Agreement. The EDC presented arguments concerning the Employment Agreement in its Arbitration Brief and its Closing Statement. The EDC did not raise any objections to the arbitrability of the Employment Agreement claim until it filed its Closing Statement on March 2, 1998, nearly one month after the arbitration hearing was concluded. By that time, the EDC had already waived its right to object. *American Motorists Ins., supra.*

E. The Michigan Courts Did Not Err When They Rejected the EDC's Claims of Sovereign Immunity.

From the foregoing, it can be seen that the Michigan Courts did not err when they rejected the EDC's arguments concerning its waiver of sovereign immunity. To summarize, the key facts are as follows:

- The EDC expressly waived its sovereign immunity with regard to the JVMA and all agreements executed and delivered at the Closing.

- The Employment Agreement was one of the agreements executed and delivered at the Closing.

- The EDC agreed to arbitrate any claims arising out of or relating to the JVMA.

- The key terms of the Employment Agreement were included in the JVMA, and the JVMA was "subject to the terms" of the Employment Agreement.

- The terms of the JVMA were incorporated by reference into the Employment Agreement.

- The EDC willingly participated in the arbitration of Young's claims relating to the Employment Agreement.

Young's claim relating to the Employment Agreement clearly arose out of or related to the JVMA and/or the agreements delivered at the Closing. As such , Young's claim came within the scope of the EDC's waiver of sovereign immunity. The EDC essentially acknowledged this when it willingly participated in the arbitration. Accordingly, the Michigan courts did not err when they rejected the EDC's arguments and confirmed the arbitration award.

III. The Michigan Judgment Interest Statute Was Properly Applied in this Case Because the EDC Agreed That Any Disputes Would Be Resolved by Application of Michigan Law.

Finally, the Michigan Court of Appeals did not err when it awarded statutory judgment interest to Young. In the JVMA, the EDC expressly agreed that the resolution of any disputes would be governed by Michigan law. The relevant portion of the JVMA provides as follows:

> **14.3 Waiver of Sovereign Immunity and Consent to Suit.** The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:
>
> . . .
>
> (b) the governing law shall be the law of the State of Michigan . . . .

(App. to Br. in Opp. pp. 6b). The Employment Agreement also expressly provided that it was to "be governed by and construed according to the laws of the State of Michigan . . . ." (App. to Br. in Opp. pp. 21b).

Among other things, "the law of the State of Michigan" provides for the mandatory award of judgment

interest in civil actions, including actions to confirm arbitration awards. *Holloway v. Board of County Road Commissioners*, 450 Mich. 608, 618; 543 N.W.2d 923 (1996). Under controlling Michigan case law, when a party files an action to confirm an arbitration award, it is entitled to recover statutory interest from the date the arbitration award is entered through the date the judgment confirming the award is satisfied. *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 438 Mich. 488, 506-510; 475 N.W.2d 704 (1991); *Holloway, supra* at 618. Applying Michigan law to the present case, it is clear that Young is entitled to recover statutory interest from the EDC.

In its Petition, the EDC argues that the "no interest rule" applicable to the United States government should be applied to Native American tribes. The "no interest rule" bars interest awards against the United States government unless the government has specifically waived its immunity with regard to interest, either by contract or by statute. *Library of Congress v. Shaw*, 478 U.S. 310, 314-316 (1986).

There are several problems with the EDC's argument, however. First, the EDC has not cited any case in which any court has ever extended the "no interest rule" beyond the federal government. In fact, this Court has stated in the past that the "no-interest rule" is to be applied "only where the United States' liability for interest is at issue." *Missouri v Jenkins*, 491 US 274, 281, n. 3 (1989).

Next, the EDC ignores one of the primary exceptions to the "no interest rule". As this Court noted in *Shaw*, *supra* at 317, n. 5 "[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." In this case, the EDC "cast off the cloak of sovereignty and

assumed the status of a private commercial enterprise" when it entered into the joint venture with Young. Accordingly, the "no-interest rule" does not apply.

Finally, the EDC's argument fails to address the fact that the EDC specifically agreed that any disputes would be resolved by the application of Michigan law. As noted above, Michigan law requires an award of interest in an action to confirm an arbitration award. *Gordon Sel-Way, supra; Holloway Construction, supra.* Applying the analysis of the *C&L Enterprises* case, it is clear that by agreeing to resolve any disputes according to Michigan law, which includes mandatory interest, the EDC has waived its sovereign immunity with regard to the interest issue.

The practical effect of allowing the EDC to avoid statutory interest would be to reward the EDC for tying up the arbitrators' award in this case for more than 4 years. Not only would this be unfair to Young, it is also contrary to the underlying purpose of arbitration - to provide for the quick and inexpensive resolution of legal disputes. Accordingly, the Michigan courts did not err when they awarded mandatory statutory interest to Young.

CONCLUSION

The EDC has failed to identify a single compelling reason for this Court to exercise its discretionary jurisdiction in this case. Contrary to the EDC's arguments, this case does not involve important federal questions concerning state court encroachment on tribal sovereignty. Rather, it involves a private contractual dispute in which a tribal entity that expressly waived its sovereign immunity is attempting to avoid its contractual obligations by asserting sovereign immunity simply because it was not happy with the results of

an arbitration. This clearly does not involve any important questions of federal law. Accordingly, the Petition should be denied.

Respectfully submitted,

JAMES K. THOME (P 25629)
Counsel of Record
VANDEVEER GARZIA
1450 W. LONG LAKE ROAD
SUITE 100
TROY, MI 48098
(248) 312-2800

RANDALL J. GILLARY (P 29905)
KEVIN P. ALBUS (P 53668)
RANDALL J. GILLARY, P.C.
201 W. BIG BEAVER ROAD
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TROY, MI 48084
(248) 528-0440

APPENDIX 1

JOINT VENTURE MASTER AGREEMENT

THIS AGREEMENT, made as of this 15th day of December, 1994, by and among SPP, INC., a Michigan corporation ("Special"), ERNEST I. YOUNG ("Young"), and the SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (the "Tribe"), a federally recognized Indian tribe organized under federal law, doing business as the **SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, the ("EDC")**, an entity chartered to do business by and for the Tribe.

WITNESSETH:

Special, Young and the EDC have agreed to form a Joint Venture composed of at least two Limited Liability Companies for the purpose of developing, manufacturing and supplying plastic parts and products to end use manufacturers. They desire to specify the terms of that joint venture in this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein set forth, the adequacy and receipt of consideration being acknowledged, Special, Young and the EDC agree, covenant and promise as follows:

1. **Joint Venture Companies**. The parties shall form and operate at least three separate Limited Liability Companies, described below, for this Joint Venture. The

EDC and Young shall each own 50% of SPPLLC and NABGLLC.

A. SPPLLC. An operating company named Special Plastic Products L.L.C. ("SPPLLC"), Special is currently engaged in the business of developing, manufacturing and supplying plastic parts and products to end use manufacturers ("the Business"). SPPLLC shall continue and expand upon the operations of Special.

B. NABGLLC. The second company, named NAB Group L.L.C. ("NABGLLC"), shall own the land, manufacturing facility, and improvements ("the Plant") to be acquired by the Joint Venture, and any other real property acquired by the Joint Venture. NABGLLC will lease the Plant and other facilities to SPPLLC pursuant to a net lease, a pay the mortgage on any such acquired properties.

C. SPELLC. A third company, named Special Products Engineering L.L.C. ("SPELLC"), shall engage in engineering operations in conjunction with the conduct of business by SPELLC. SPELLC shall be owned one-half by the EDC, and one-half by Young.

These three entities are referred to in this Agreement collectively as the "Companies", or singularly as a "Company".

***

9. Implementation. The promises and agreements of the parties are further conditioned upon and subject to the terms and provisions of the following documents to be executed and delivered am Closing:

A. Operating Agreements. Separate Operating Agreements for each of the three Companies, which will provide for centralized management of each of the Companies by a Board of Managers (with Young serving as CEO), provide other terms restricting transfer of Member interests, allocation of depreciation to Young, and control the governance of each Company. These Agreements will include suitable provisions for appointment of two Managers each by Young and the EDC, and of a fifth neutral Manager to avoid and resolve deadlocks. However, EDC shall appoint the fifth Manager for so long as any of the following events are uncured: (i) failure to pay a minimum payment specified in Section 3.5(c) above within 60 days of its due date, (ii) default in the payment of Expansion Loan interest or the Transaction Cost Loan for a 180 consecutive day period, and (iii) any time the EDC's sharing ratio exceeds 60% under an adjustment, but correcting for depreciation allocations.

B. Young Employment Agreement. Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and

supervision of their respective Management Boards, at compensation of $145,000 per year plus benefits, bonus of 2% for gross sales exceeding $12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.

C. Transfer Documents. All documents necessary effectuate the transfer of the Transferred Assets and Assumed Liabilities to SPPLLC from Young and Special.

D. Articles. The parties shall execute Articles of Organization for each of the Companies, and all other necessary papers to be filed, including reservation of the name for the Companies.

E. Loan Agreement. A Loan Agreement incorporating the terms summarized in Section 3, together with appropriate notes and security agreements.

F. Young's Agreement. Young will deliver and execute to the EDC and the Companies a non-competa agreement, a confidentiality agreement, an invention agreement (excepting those matters unrelated to the business of SPPLLC), and an agreement not to participate in any outside ventures

without prior approval cf the Company Managers appointed by EDC.

***

14. Remedies.

14.1 Notice of Default. In the event of a default by the
EDC in making the contributions specified herein or timely proceeding to Closing, by Young and/or Special in undertaking those contributions and actions specified herein, or by any party in failing to perform as provided in this Agreement, the aggrieved party shall provide the defaulting party with written notice declaring that default, and if such default is not cured within ten (10) days after notice is sent, the aggrieved party may pursue a remedy as provided in this Section.

14.2 Arbitration.

(a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

(b) Notwithstanding sub. (a), any party shall have the right to pursue provisional or ancillary remedies (such as injunctive relief, attachment or appointment of a receiver), or to seek specific performance, from any court having jurisdiction. The pursuit of such remedies shall not constitute a waiver of the party's right to submit the same matter to arbitration, as to monetary damages or other non-equitable relief.

14.3 Waiver of Sovereign Immunity and Consent to Suit. The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

(a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the Companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1).

The EDC has approved this waiver by resolution. The resolution and Tribal Code § 40.108 are attached in Exhibit T.

***

20.4 Governing Law. This Agreement shall be construed in accordance with the laws of the State of Michigan, and applicable Federal law.

***

20.7 Interpretation. This is the entire agreement with respect to its subject matter, except for those Agreements expressly referenced herein. All prior and contemporaneous representations are merged herein. Terms used shall be in the singular or plural where appropriate

***

The parties hereto have executed this Joint Venture Master Agreement on the day set forth on the first page of this Agreement.

WITNESSES:

/s/ _____

/s/ _____

/s/ _____

/s/ _____

SPP, INC., a Michigan corporation

By: /s/_____
Ernest I. Young
Its: President

/s/_____
Ernest I. Young

THE SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION

By: /s/ _____
Bernard Bouschor
Its: Chairman

APPENDIX 2

SPECIAL PLASTIC PRODUCTS L.L.C.

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT, made and entered into effective the 1st day of January, 1995, by and between **SPECIAL PLASTIC PRODUCTS L.L.C.**, a Michigan limited liability company, (the "Company"), **SPECIAL PRODUCTS ENGINEERING L.L.C.**, a Michigan limited liability company ("SPELLC"), **NAB GROUP L.L.C.**, a Michigan limited liability company ("NABGLLC",), and **ERNEST I. YOUNG**, ("Employee").

RECITALS:

Young has been President and sole owner of the predecessor to the Company for more than 15 years. Young has recently entered into a joint venture with The Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe"), which includes Young's operation of the Company. The Company thus desires to employ Young as Manager and Chief Executive Officer of the Company under the terms of this Agreement.

The owners of the Company also have related enterprises known as NABGLLC, which owns the real estate the Company operates from, and SPELLC, which conducts related engineering operations. Young is also by this agreement retained as Chief Executive Officer of those entities under this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the promises and agreements stated herein, the receipt and adequacy of consideration being hereby acknowledged, Company and Young agree, promise and covenant as follows:

1. SERVICES.

1.1 Company. The Company engages the services of Young as Chief Executive Officer of the Company. Young shall retain sole responsibility for maintaining and controlling the day-to-day operations of the Company, including the authority to do all acts permitted of the CEO under the Company's Operating Agreement, subject only to those limitations stated in the Operating Agreement. Young shall direct and control all employees of the Company, and has the exclusive discretion to delegate portions of his responsibilities and powers to officers and employees of the Company.

1.2 Related Enterprises. Young is also hereby retained as Chief Executive Officer of SPELLC and NABGLLC. He shall carry on those duties and tasks specified in the Operating Agreement for each of those enterprises. He shall receive no additional compensation by reason of those duties. The Company's accountants may, however, allocate a ratable portion of Young's compensation and benefits to those enterprises as is appropriate.

2. YOUNG'S EFFORT. Young will undertake his duties in good faith, with the care of an ordinary prudent person in like circumstances, consistent with the best interests of the Company.

3. INCOME.

3.1 Salary Young shall be paid an annual salary of $145,000 per year, payable at least twice monthly, or by such other frequency as is elected by the Company. The Company shall review the salary of Young during the first quarter of each calendar year, and if Gross Sales (as defined below) have increased over the level of Gross Sales for the previous year (regardless of whether Net Cash Flow has been generated), then Young's salary shall be increased by an amount to be set by the Company of not less than three (3%) or more than six (6%) percent of the previous year's salary for that calendar year. Salary payments for the year shall be adjusted to reflect the increase on an annualized basis.

3.2 Bonus. In addition to all other payments made to Young hereunder, Young shall be paid a bonus each year the Company generates Net Cash Flow (as that term is defined in the Company's Operating Agreement), in the following amounts:

A. For calendar year 1995, 2% of the amount of Gross Sales in excess of $12,500,000;

B. For each calendar year thereafter, 2% of the increase in Gross Sales above the greater of (i) Gross Sales in the last calendar year for which a bonus was paid, or (ii) $12,500,000.

The bonus shall be paid to Young within 30 days after Gross Sales for the previous year are ascertained by the firm's accountants, and shall be subject to adjustment if an audit is

performed or the statements are corrected within one year after the bonus is paid. The obligation to pay a bonus for service during the term hereof shall survive the expiration or termination of this Agreement.

3.3 Benefits. Young shall be paid the following benefits by the Company: health insurance for his family; the premium for his present $1,000,000 life insurance policy, for the benefit of his family; disability insurance; and membership dues aud fees at Indianwood Country Club. The Company shall pay the comparable cost of any replacement of the foregoing items. The Company shall assume the existing vehicle lease on the Cadillac Seville currently used by Young, and provide that vehicle for Young's use, and upon expiration of the lease shall thereafter provide Young with a vehicle allowance (or payment) equivalent to the cost of a three year lease of a vehicle equivalent to a Cadillac Seville. In addition to the foregoing, Young shall be entitled to Pension, Keogh Plan or equivalent benefits equal to five (5%) percent of his salary. Young shall also receive reimbursement of any taxes he incurs in liquidating the predecessor to the Company, to be advanced to Young concurrent with the returns or dates any such payments are owed, up to a total of $230,000.

3.4 Loans. Young shall be entitled to borrow up to Fifty Thousand and 00/100 ($50,000) Dollars from the Company, provided the Company generates a Net Cash Flow in any year a loan is extended, after paying its minimum commitment to the Tribe under the Expansion Loan. Young must repay such loans within one year, or immediately if the conditions in the previous sentence are not met. All loans shall accrue interest at the imputed interest rate of the Internal Revenue Service.

3.5 Gross Sales. As used herein, "Gross Sales" means the proceeds received by SPPLLC and SPELLC from all business operations of whatever nature in the applicable period, calculated in accordance with generally accepted accounting principles, consistently applied, less returns and allowances, and excluding any sales or other business conducted by SPELLC which is obtained from, or paid by, SPPLLC.

4.EXPENSES. Young shall receive reimbursement for all travel, business and entertainment expenses reasonably incurred by him in connection with the Company's business. Such expenses shall be reported contemporaneously, and paid promptly upon presentation of appropriate vouchers and receipts, in accordance with policies adopted by the Management Board.

5. VACATION. Young shall be entitled to five weeks' vacation annually during the term of this Agreement, to be taken at such times as shall be reasonably determined by Young.

6. TERM OF AGREEMENT. This Agreement commences as of the date hereof and has a minimum term of five years and four months, through December 31, 1999. This Agreement shall be automatically renewed each year thereafter for up to seven additional consecutive years, unless sooner terminated as provided herein. Following the initial twelve year period, this Agreement shall be automatically extended for one additional year unless on or before September 30 of each year, either Young or the Company notify the other in writing that the term shall not be extended for an additional year.

7. TERMINATION.

7.1 Without Cause. This Agreement shall terminate upon the death or disability of Young, or sale or transfer by SPP of its entire interest in the Company, or by Young of his entire interest in SPP, excepting in each case any permitted assignment under the Company's Operating Agreement. Young may terminate this Agreement upon 60 days' written notice, with or without cause. If Young terminates his employment without the written consent of the Management Board, the Company has no further obligation to Young.

7.2 For Cause. The Company may terminate this Agreement for cause by giving Young written notice of termination specifying with particularity the basis for termination. Termination for cause is strictly limited herein to (a) conviction for committing a felony, (b) fraud or theft of Company property, and (c) gross negligence or recklessness in Young's performance of his duties hereunder, which causes material harm to the Company. No advance notice is required for violations of (a) or (b). If any violation under (c) generates circumstances which are continuing or can be cured, then Young shall be given 20 days after written notice to cure the situation.

7.3 Liquidated Damages. If this Agreement is terminated by the Company without cause, except as provided in ¶ 6, then Young shall be paid the following by the Company:

A. For terminations during the initial five year term of this Agreement, the amount equal to

all salary, bonus and benefits payable from the date of termination through the end of the initial term; or

B. For all terminations thereafter, the amount equal to all salary, bonus and benefits for one year.

In calculating the amount payable, the rate of salary and benefits payable to Young at the time of termination shall be used, adjusted as provided in this Agreement. The highest bonus payable to Young in the year of termination or the previous three years shall be used. There shall be no reduction to present value, or offset for mitigation from other income of Young against the amount paid as to the first year; all sums thereafter shall be subject to such offset or mitigation. Such payment shall not excuse a termination in violation of this Agreement, but shall be liquidated damages for all claims of compensation of Young after the date of termination against the Company, its Members and Managers.

7.4 Prorations. If Young's employment is terminated or expires in a manner which requires calculation of any item of compensation for a partial year, all items payable for that year shall be prorated by comparing the number of days in that year through the date of termination or expiration to the number of days in that year (365/6).

8. DISABILITY. Young shall be deemed disabled upon the occurrence of any of the following:

a. His death;

b. The occurrence of any physical or mental incapacity which renders him unable to continually and consistently conduct the business of the Company for any consecutive six month period; or

c. The written determination by two physicians independent of one another that Young is at that time suffering a mental or physical condition that renders him unable to continually and consistently conduct the business of the Company for any consecutive six month period.

Young shall reasonably cooperate with any request of the Company to conduct examinations necessary to make the foregoing determination, if there is reasonable cause for such examinations.

9. INDEMNITY. The Company, SPELLC and NABGLLC shall indemnify, defend and hold harmless Young to the extent provided for by applicable law and in the Operating Agreement, including paragraph 6.2 of that Agreement.

10. NON-COMPETITION/CONFIDENTIALITY.

10.1 Covenant. Young shall not, during the term of his employment with the Company, directly or indirectly, for himself or as agent of or on behalf of or in conjunction with

any other person, firm, association, or corporation, or as an employer, employee, partner or other associate, enter into competition with the Company within North America. For the purpose of this covenant, competition shall mean the manufacture and production of products and services of the type then produced by the Company, or substantially similar thereto, to customers of the Company. The protection of this covenant is intended for the benefit of the Company, its subsidiaries, and successors.

10.2 Confidentiality. Young acknowledges that Company's documents, cost analyses, customer lists, names of persons having, dealt with the Company, which Young shall have access to in connection with his duties hereunder, whether designated by the Company as such or not, are confidential and proprietary data which disclosure to, or use by, a third party will be damaging to the Company. Young shall hold such material and information in strict confidence, not make use thereof other than to perform this contract, release the information only to employees requiring such information in connection with their employment, and not release or disclose the information and materials to any unauthorized persons.

10.3 Inventions. Any inventions or discoveries, whether or not they can be registered under a patent or copyright, resulting from any work performed by Young for the Company, NABGLLC or SPELLC under this Agreement (alone or with others) shall be promptly disclosed to the Company and shall be its exclusive property. All inventions or discoveries belonging to Young prior to his employment by the Company and which relates to the business of the

Company are hereby assigned to the Company and shall be its exclusive property. Young agrees to signa and deliver at any time any instruments confirming such rights of the Company.

10.4 Enforcement. In the event of the violation or attempted violation of this provision, and in addition to any legal or equitable remedy which may be available to the Company, this provision may be enforced by an injunction or action for specific performance, without necessity for proving damages.

10.5 Continuation. This covenant not to compete shall continue for a period of 18 months following termination of Young's employment with the Company, except when the Company terminates his employment without cause.

11. OUTSIDE INTERESTS. Young shall not, during the term of his employment with the Company, directly or indirectly, for himself or as agent of or on behalf of or in conjunction with any other person, firm, association, or corporation, or as an employer, employee, partner or other associate, enter into, participate in or conduct any business venture, company, or enterprise, without the prior written approval of the Company Managers appointed by the Economic Development Commission of The Sault Ste. Marie Tribe of Chippewa Indians. The following are not subject to the prohibition state in this paragraph:

(a) Normal business activities undertaken with respect to those enterprises listed in Exhibit "U" to the Joint Venture Master Agreement, provided such

activities are not changed to compete with the Company;

(b) Investments on any recognized stock exchange or other market;

(c) Investments in any form of business entity which does not compete with the Company, NABGLLC or SPELLC, and in which Young's actual role is limited to the functional equivalent of a "passive investor" (as that term is defined in the Code) or a limited partners; and

(d) Participation by Young as a director, board member, officer, or other like position with a charitable, for-profit or non-profit institution, including but not limited to the Michigan Minority Business Development Council, financial institutions, and community-based organizations.

12. SUPPORT. The Company shall provide Young with secretarial support, office space, office equipment, furnishings, supplies and other support suitable for his position as Chief Executive Officer of the Company.

13. GENERAL TERMS.

13.1 Waiver. One or more waivers of any covenant or condition of this Agreement shall not be construed as a waiver of a subsequent breach of the same covenant or condition.

13.2 Notices. Whenever under this Agreement a provision is made for notice of any kind, it shall be deemed sufficient notice and service thereof if such notice is in writing and mailed with first class postage prepaid, by certified or registered mail, by personal delivery, or by express overnight delivery service, to the parties at their addresses on file with the Company, or at such other address as they shall from time to time specify in writing.

13.3 Partial Invalidity. If any term, covenant, or condition of this Agreement or its application to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant or condition to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be effected thereby. Each term, covenant or condition of this Agreement shall be valid and enforced to the fullest extent permitted by law.

13.4 Non-Assignability. This is a personal services contract which cannot be assigned by any party.

13.5 Incorporation. This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement. This

Agreement does not supersede, replace or abrogate any provision of the Joint Venture Master Agreement or any other document executed as part of the transaction governed by the Joint Venture Master Agreement. Any inconsistency between this Agreement and any other such document as to any facet of Young's employment by the Company, SPELLC, and NABGLLC shall be governed by this Agreement. All provisions of the Joint Venture Master Agreement and other documents executed as part of the transaction governed by the Joint Venture Master Agreement survive execution of this Agreement.

13.6 Entire Agreement. Except for those documents referred to in Section 13.6 or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. All prior agreements, statements, or representations between the parties and their agents and/or employees, whether written or oral, are expressly merged herein and, if not contained in this Agreement, are of no force or effect. This Agreement shall not be modified, changed, altered, or discharged whatsoever, except by an agreement in writing executed by all parties hereto.

13.7 Applicable Law. This Agreement shall be governed by and construed according to the laws of the State of Michigan, and applicable provisions of federal law.

13.8 Successors. The covenants, conditions and agreements made and entered into by the parties hereto shall inure to the benefit of and shall be binding upon their

respective heirs, successors, representatives and assigns.

IN WITNESS WHEREOF, the parties have signed and delivered this Employment Agreement as of the date indicated on page 1.

WITNESSES:

/s/ _____ /s/_____
Ernest I. Young

/s/ _____

SPECIAL PLASTIC PRODUCTS L.L.C., a Michigan limited liability company

/s/ _____ By: /s/_____

/s/ _____ Its: Manager

NAB GROUP L.L.C., a Michigan limited liability company

/s/ _____ By: /s/_____

/s/ _____ Its: Manager

SPECIAL PRODUCTS ENGINEERING L.L.C., a Michigan limited liability company By: ITS MEMBER, THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

/s/ _____ By: /s/_____

/s/ _____ Its: Manager

APPENDIX 3

FOLD OUT EXHIBIT (Pages 1 & 2)
Appendix pages 24b-25b

Letter from Bernard Bouschor to Ernest Young dated 10/2/96

Sault Ste. Marie Tribe of Chippewa Indians

Administrative Office

523 Ashmun Street
Sault Ste. Marie
Michigan
49783
Phone
906.635.6050
Fax
906.635.4969

Government Services

Membership Services

Economic Development Commission

October 2, 1996

Mr. Ernest I. Young
8720 Dixie Highway
Fair Haven, MI 48023

Re: Termination from employment

Dear Mr. Young:

As authorized by SPECIAL PLASTIC PRODUCTS LLC (the "Company") Management Board resolution dated September 5, 1996, your employment with the Company is terminated for cause, effective immediately.

The grounds constituting cause for which you are terminated are as follows:

(1) Gross negligence in the management of the affairs of the Company, including administration, bidding and pricing of contracts, and all phases of operation, precipitating a financial crisis in the Company;

(2) Excessive absenteeism;

(3) Concealing the true financial situation of the Company from the Management Board;

(4) Continually delaying the submission of financial statements to the Management Board;

(5) Violations of Section 4.3 of the Operating Agreement, which reserve certain Company actions and decisions to the Management Board, as has been previously communicated to you;

(6) Violation of each of the provisions of the Code of Conduct adopted by the Management Board on April 1, 1996;

(7) Engaging in intolerable behavior at the Company's facilities and in the presence of Company employees unbecoming of an employee, such as being assaultive and disruptive both verbally and physically;

(8) Obtaining Company payment for personal expenses unrelated to Company business, such as monies used to pay personal credit cards, meals, golfing, vacations, and the like;

BEST AVAILABLE COPY

(9) Driving a Company vehicle for many months after suspension of driver's license, and failing to surrender the vehicle when directed to do so by the Company; and

(10) Seizing control of the Company's Ryan Road facility, denying access to Company equipment and property to Company management.

The Management Board has determined that the above grounds are not amenable to being cured, and therefore the termination shall be effective immediately. This termination is effective as to your employment as CEO of the Company, of NAB Group LLC, and of any and all other paid and unpaid positions with the Company or NAB.

You will receive no severance pay or any other type of pay for services from and after today. Subject to any rights you may have under federal law to elect to continue medical insurance coverage at your own expense (of which, if any, you will be notified under separate cover), your medical insurance and all other insurance and fringe benefits will be terminated as well.

Given your past conduct and our concern for the safety of the employees, you are advised that you are to stay away from Company premises, including the Ryan Road facility, from and after today's date. Any rights of access that you may have under law or the Operating Agreement as a Member or Manager to the books and other information concerning the Company will be honored at a location off the premises.

This action and the contents of this letter will be kept confidential by the Company and the Tribe except insofar as may be necessary to conduct the affairs of the Company or to protect the legitimate interests of the Tribe. This action does not foreclose further discussions to resolve your involvement in the Company on a mutually satisfactory basis.

Sincerely,

Bernard Bouschor

Bernard Bouschor
Chairman, Special Plastic Products LLC Management Board

cc: Norman Orr
R. Bradley Lambert

APPENDIX 4

STATE OF MICHIGAN
AMERICAN ARBITRATION ASSOCIATION

No. 54 1450043796

[Filed January 20, 1998]

ERNEST I. YOUNG and SPP, INC.,	)
	)
Claimant,	)
	)
v.	)
	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,	)
	)
Respondents.	)
	)

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CLAIMANT'S ARBITRATION BRIEF

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The agreements between the parties did not contain any specific provisions requiring The Tribe to cooperate with the efforts to obtain financing. Accordingly, these were matters within The Tribe's discretion, and The Tribe was bound by an implied covenant of good faith and fair dealing to perform its obligations in a manner consistent with the reasonable expectations of the parties and in a manner which would not violate community standards of decency, fairness and reasonableness. See *Hubbard Chevrolet, supra*. However, The Tribe violated these duties when it failed to cooperate with the efforts to obtain sufficient financing to complete the Pontiac expansion, and when it returned the Cowl Vent job to GM. In light of the original purpose of the joint venture, these actions by The Tribe were clearly unreasonable: directly contrary to the expectations of Mr. Young; and violation of the Tribe's implied covenant to act in good faith and to use fair dealing.

ARGUMENT IV

THE TRIBE BREACHED THE EMPLOYMENT AGREEMENT WITH ERNEST YOUNG BY TERMINATING HIM WITHOUT CAUSE AND FAILING TO PAY THE COMPENSATION PURSUANT TO THE AGREEMENT.

Paragraph 6 of the Employment Agreement provides as follows:

6. TERM OF AGREEMENT. This Agreement commences as of the date hereof and has a minimum term of five years and four months, through December 31, 1999. This Agreement shall be automatically renewed each year thereafter for up to seven additional consecutive years, unless sooner terminated as provided herein. Following the initial twelve year period, this Agreement shall be automatically extended for one additional year unless on or before September 30 of each year either Young or the Company notify the other in writing that the term shall not be extended for an additional year.

The clear language of the agreement is that its term was to be a minimum of 5 years (1995-1999). The agreement was then to automatically renew for up to seven additional years (2000-2006) unless terminated in accordance with the terms of the agreement. There were only 6 circumstances which could justify a termination of the agreement: Three "without cause" and three "for cause."

The "without cause" justifications for termination are set forth in paragraph 7.1 and are as follows:

(a) Death or disability of Young;

(b) Sale or transfer by SPP of its entire interest in the company;

(c) Sale or transfer by Young of his entire interest in SPP. (¶ 7. 1)

None of these occurred.

The "for cause" justifications are set forth in paragraph 7.2 and are follows:

(a) Conviction for committing a felony;

(b) Fraud or theft of company property;

(c) Gross negligence or recklessness in Young's performance of his duties which causes material harm to the company. If any violation under this section is continuing or can be cured then Young shall be given 20 days after written notice to cure the situation.

None of these occurred.

The Tribe's justification for the immediate termination of Ernest Young is set forth in exhibit 52, a letter from Bernard Bouschor dated October 2. 1996. None of the purported justifications allege a conviction of a felony or

fraud or theft of company property.. There are 3 questions which must be addressed regarding each of the Tribe's purported justification for the termination, based upon subparagraph (c) immediately above:

(1) Did the alleged activity constitute gross negligence or recklessness?

(2) Did the alleged activity cause material harm to the company?

(3) Was the alleged activity continuing or curable? (If so, then the alleged activity was insufficient grounds for termination because no 20 day notice was provided with an opportunity to cure.)

None of the activities alleged in the termination notice appear to be one-time incidents which, even if true and resulted in material harm, could not have been cured in some fashion.

Paragraph 7.3 of the Employment Agreement contains a provision for liquidated damages covering the balance of the initial five-year term. Claimant however, is not limited by the liquidated damages provision because the termination was not "without cause." Further, the agreement was non-terminable without cause unless the three circumstances described in ¶ 7.1 existed; i.e., death or disability; transfer of SPP's interest in the company; or transfer of Ernie's interest in SPP. SPP LLC and NAB Group LLC are liable for Ernie's employment benefits for the full 12 year term. The benefits are described in ¶ 3 and are as follows:

(a) Salary, - $145,000 annually adjusted between 3% and 6% annually in any year where there is an increase in sales. ¶ 3-1.

(b) Bonus - if the company generates Net Cash Flow then a bonus of 2 % of Gross Sales in excess of $12.5 million or of the increase in sales over the last year in which a bonus was paid. The bonus obligation survives expiration or termination of the Agreement.

(c) Benefits - health insurance for family; premium on $1,00,000 life insurance policy for family; disability insurance; membership dues and fees at Indianwood County Club; Cadillac Seville; 5 , % of salary, as benefits for Pension. etc., and reimbursement of taxes on liquidation of SPP of up to $230,000.00.

A. The Tribe Should Be Held Liable For the Breach of the Employment Agreement.

Michigan law has long recognized the principle that a corporate entity may be disregarded in order to avoid injustice. See, e.g., *In re Culhane's Estate.* 269 Mich 68, 76 (1934.).[20] [T]here are three requisites to piercing the

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[20] Although SPP LLC is a limited liability company, rather than a corporation, the limited liability aspects of the company are essentially the same as those of a corporation. Furthermore, the equitable principles set forth in the case law concerning piercing the corporate veil appear to be well suited for application to limited liability companies. Accordingly, the case law

corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *Nogueras v Maisel & Assoc.* 142 Mich App 71.86 (1985).

Once the Workout Agreement was signed on February 27, 1996, the Tribe effectively controlled SPP LLC and NAB Group LLC. By having 3 of the 5 manager votes, the Tribe could and in fact did dictate the future and lack thereof of the company. It should be noted that the 3 managers appointed by the Tribe were high ranking officials or representatives of the Tribe. Bouschor is the Chairman or Chief of the Tribe; Nolan is the Chief Judge of its Tribal Court (see Exhibit 61); and Brannen is the Tribe's Financial Analyst.

In one of the lawsuits filed in the Oakland County Circuit Court, Claimants sued the individual managers of SPP LLC, Bouschor, Brannen, and Nolan, alleging that they violated their fiduciary duty to the company. The Tribe's defense was that Bouschor, Brannen and Nolan were not liable to the LLC because they were acting as representatives of the Tribe and were protected by sovereign immunity. See Exhibit 62. Judge Robert Anderson agreed and granted Respondent's Motion For Summary Disposition. Exhibit 62.

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concerning piercing the corporate veil should be applied to this case.

Specifically Respondent's Counsel made the following representations to the Court in its Brief:

1. "The Defendant's are the duly authorized representatives of a federally-recognized Indian Tribe... Plaintiff should be required to return to the proper forum - in this case arbitration - and make whatever claims they believe they have against the real party in interest here, The Tribe EDC..." P 1.

2. "The individual Defendants also enjoy immunity while acting in their official capacity. Cameron, infra." P 2.

3. "What is clear is that Defendants have no personal interest in the LLC, unlike Plaintiffs. Thet (sic) act as representatives of the EDC, a Tribal entity enjoying immunity." P 5.

4. "Its representatives - the Defendants - therefore act in an official capacity (recognized by Congress) for a valid Tribal function." P 6.

5. "The EDC was the member of the LLC, not Defendants, and although the Defendants may have cast the votes as member representatives which implemented some of the events which Plaintiffs assert are illegal (footnote 2), they did so as the *representative of the FDC."* Footnote 2 stated as follows: "Of course, the refusal of the EDC/Tribe to provide additional financing acceptable to Plaintiffs was completely out of the hands of the managers of the LLC. Any complaint that Defendants, as managers, were some how responsible for this refusal

is patently specious. Any such complaint could only lie against the EDC." (emphasis supplied) P 8.

6. "If fact, the Affidavit of George Nolan makes it clear that every decision and act of the Defendants was within their authority as representatives of the EDC. . . And, the individuals served the EDC in a representative capacity.." P 10

7. "The Master Agreement and the Operating Agreement entitle Plaintiff to pursue arbitration for any alleged breaches of ,those Agreements. Plaintiff Young has, in fact, demanded arbitration for alleged breaches of the Master Agreement, the Operating Agreement and the Employment Agreement, which demand was filed on or about October 25, 1996. This arbitration is proceeding under the auspices of the American Arbitration Association. Plaintiff has asked for damages based upon the alleged loss of his interest in the LLC. There is no reason to expect that arbitration will not fully compensate Plaintiffs for damages, if any, they may have suffered as a result of the Special Plastic Products Joint Venture..." P 14

8. "**II. SUMMARY... All Counts.** Defendants cannot be sued based on their conduct as managers of the LLC as they are representatives of the Tribe and are protected by sovereign immunity." P 19.

Respondent's Counsel contended in a judicial proceeding that the duty owed by Bouschor, Brannen and

Nolan was to The Tribe and not to the LLC[21] The Tribe cannot have it both ways. The Tribe is judicially estopped from asserting in this proceeding that the managers, in voting to terminate Young and give back the cowl vent job, were not acting on behalf of the Tribe. *Tricom, Inc v Electronic Data Systems Corp.* 902 F. Supp. 741 (E.D. Mich. 1995) Under general agency principles, and the admissions by Respondent's counsel, the Tribe is liable for the acts of Bouschor, Brannen and Nolan. *Borock v Comerica.* 938 F. Supp. 428, 431 (E.D. Mich. 1996). ("Under the doctrine of respondent superior, a principal is liable for *all* acts of its agent committed within the scope of his employment.") (Citing *Shinabarger v Philips.*370 Mich 135, 139 (1963); *Renda v UAW,* 366 Mich 58, 95 (1962)). Also See *Cronk v. Chevrolet Local,* 32 Mich App 394, 401 (1971); *Herndon v UAW,* 56 Mich App 435, 438 (1974).

The three requisites set forth in the case of *Noguras* above have been met:

1. After the removal of Young from the management board, SPP LLC and NAB Group LLC were mere instrumentalities of the Tribe.

2. The Tribe used the entity, to commit a wrong(s), i.e., the wrongful termination of Young; the return to GM

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[21] Please note that the letters written by Bernard Bouschor relative to this matter as reflected in Exhibits 24 and 52, were written on Tribal letterhead and not on the letterhead of any of the LLC's involved. Further, virtually every fax or letter written by Branned in this matter and identified in the exhibits, was sent using Tribal letterhead.

of cowl vent job; and the sale of the assets of SPP LLC.

3. There clearly is an unjust loss and injury to Ernie Young. His company and his livelihood have been totally destroyed. It is hard to imagine a more definitive unjust loss or injury.

Accordingly, the Tribe should be held accountable and liable for the actions of its representatives in breaching Ernie Young's Employment Agreement.

***

Respectfully submitted,

RANDALL J. GILLARY, P.C.

BY: /s/ _____
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DATE: January 20, 1998

APPENDIX 5

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

No. 54 1450043796

ERNEST I. YOUNG and SPP, INC.,	)
	)
Claimants,	)
	)
v.	)
	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,	)
	)
Respondents.	)
----------	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,	)
	)
Counter-Claimants.	)

v.)
)
ERNEST I. YOUNG and SPP. INC.,)
)
Counter-Respondents.)
)

RESPONDENTS' ARBITRATION BRIEF

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D. There Is No Basis For Piercing The Corporate Veil.

Young's Employment Agreement was with the LLC, and not with the Tribe. Young now seeks to pierce the corporate veil of the LLC to impose liability on the Tribe EDC.

Piercing the corporate veil in an equitable remedy employed sparingly by courts to avoid injustice. It is a judge-imposed, common-law remedy. It is not a contractual right or remedy nor is it a claim for which the Tribe or the Tribe EDC waived sovereign immunity.

In any event, the doctrine of piercing the corporate veil has arisen to protect innocent parties from those who would "abuse the corporate form as a device to evade legal obligations..." *People v. Michigan Bell Telephone Co,* 246 Mich 198, 204 (1929); *Fors v. Farrel,* 271 Mich 358, 370 (1935). Although there are many different enunciations of the rule, basically, the courts will look behind the corporate fiction if the corporation has been set up to avoid a legal obligation, *and* it would be unjust to not pierce the veil. This most typically happens in cases of fraudulent

undercapitalization when a party provides some service or product to a business and when seeking payments, learns that the business is nothing more than a shell with insufficient assets to pay the debt. It does not apply to an employee who at all times knew of the finances of the LLC, was the CEO most of the time and was fully aware of who the parties were.

Similarly, the LLC was not set up for an improper purpose. The advantage of limited liability for the owners of a business is an entirely legitimate reason to form an LLC. And, since it was Young's idea, he is estopped from making any claim to the contrary based on his own unclean hands.

Finally, merely because one of the shareholders of a corporation (or the member of an LLC) has effective control of the entity because it owns the majority interest, does not mean that the corporate status can be ignored. If this were the case, no one would ever be a majority owner of a corporation or an LLC. As noted above, for a piercing claim, it is necessary that the corporate entity be set up to evade legal liabilities, or for some other improper purpose, when it is organized. Mere control is not sufficient.[13] It must also be borne in mind that Claimants never pled this new-found piercing theory. It is not before the Panel.

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[13] Respondents are aware of no case where a CEO of a corporation or an LLC was in a position to obtain piercing of a corporate veil.

APPENDIX 6

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

No. 54 1450043796

[Filed March 2, 1998]

ERNEST I. YOUNG and SPP, INC., Claimants,	)
v.	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C., Respondents.	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C., Counter-Claimants.	)

v.)
)
ERNEST I. YOUNG and SPP. INC.,)
)
Counter-Respondents.)
_____)

RESPONDENTS' CLOSING STATEMENT

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VI. RESPONDENTS DID NOT BREACH THE EMPLOYMENT AGREEMENT (COUNT V).

The final allegation in the Complaint relates to the Young Employment Agreement. It must be remembered that a great deal of the Claimants' Brief and focus of the hearing deal with matters *not set forth in the Complaint*. They are, therefore, irrelevant.

The Employment Agreement permitted termination of Young for gross negligence or recklessness in Young's performance of his duties, as well as for conviction on a felony, or for fraud or theft of Company property. (CE 10 § 17.2.) The IWA added the additional ground for termination of direct disobedience of a written policy or directive from the management board. (RE 16 § 4.) The Board then duly adopted a Code of Conduct (endorsed by Young's brother) which, among other things, made it a dischargeable offense for the CEO to "engage in fits of temper or other conduct that is abusive, disruptive,

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termination was 27 days later on October 2, 1996, when he was given a written letter of termination. (RE 23.) And, negotiations with his attorney over Young's improper behavior and leave with pay were presented before the September 3 meeting – clearly 30 days prior to his actual termination. Claimants have presented no evidence that Young cured any of the violations. In fact, there is no way to cure such violations. What is most certainly clear is that, at the very most, Young arguably had 27, rather than 30, days' notice of offenses that were not subject to cure. Yet, his claim is for $11 million. The very nature of the claim – including the fact that even if there were a breach of contract, there is a liquidated damages clause which Young ignores to assert a $4 million employment claim – reveals the ridiculousness of Claimants' position.

IV. CLAIMANTS DID NOT ALLEGE ANY CLAIM FOR PIERCING THE CORPORATE VEIL.

Young's contract of employment was with the LLC. There is no employment contract with any of the other Respondents. Although Young is not entitled to any damages under the Employment Agreement, he argues an ill-defined, vague piercing theory first raised in his brief. This is another red herring. Though Respondents' Brief shows the theory does not apply, it is not properly before this Panel. This Panel need not consider it. Indeed, it is beyond the scope of the parties' agreement to arbitrate and *may not* be considered.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Kevin J. Moody (p34900)

Louis B. Reinwasser (P37757)

March 2, 1998

By /s/ _____
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APPENDIX 7

AMERICAN ARBITRATION ASSOCIATION

No. 54-1450043796

[Filed April 10, 1998]

ERNEST I. YOUNG and SPP, INC.,	)
	)
Claimants,	)
	)
v.	)
	)
SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., NAB GROUP, L.L.C., and SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a THE SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION,	)
	)
Respondents.	)

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the December 15, 1994 arbitration agreement entered into by the above-named

parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, AWARD on the first Amended Arbitration Claim as follows:

Count I - Breach of Contract - Joint Venture Master Agreement and SPP LLC Operative Agreement

No cause for action and no damages awarded.

Count II - Dissolution and Winding Up of Special Products Engineering, LLC and NAB Group, LLC

Pending submission of further proofs.

Count III - Breach of Employment Agreement

Award to Ernest I. Young $546, 351.33 against Sault Ste. Marie Tribe Economic Development Commission and Special Plastic Products, L.L.C.

No award to Ernest I Young and SPP, Inc. against Special Products Engineering, LLC, and NAB Group, LLC.

Counter-Claim of Sault Ste. Marie Tribe of Chippewa Indians, d/b/a The Sault Ste. Marie Tribe Economic Development Commission

No cause for action and no damages awarded.

This Award is in full settlement of all Count I and Count II claims and counter-claims submitted by either party against the other in this arbitration. This Award is inclusive of all costs, attorney fees, interest, and reduction to present

value. Count II claims are still pending.

Dated 4/10/98 /s/ _____

Dated 4/10/98 /s/ _____

Dated 4/10/98 /s/ _____

APPENDIX 8

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 98-003943-CZ

[Dated July 22, 1998]

ERNEST I. YOUNG and SPP, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,	)
	)
Defendants.	)
	)

MOTIONS & COURT'S RULING

PROCEEDINGS had in the above-entitled matter before the HONORABLE DENISE LANGFORD MORRIS (P34884), Circuit Judge, on WEDNESDAY, JULY 22, 1998.

APPEARANCES:

RANDALL J. GILLARY, Esq., (P29905)
appearing on behalf of the Plaintiffs.

KEVIN J. MOODY, Esq., (P34900)
appearing on behalf of the Defendants.

PAMELA L. VOLL
Official Court Reporter
CSR 0195

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THE COURT: This matter is before the Court on multiple motions regarding the arbitration award by both Plaintiff and Defendant. Responses have been filed, and the Court has heard oral arguments here this afternoon.

The facts are briefly as follows.

This action arises from a joint venture between Plaintiff Young and the Saulte Ste. Marie Tribe of Chippewa Indians (hereinafter "Tribe") through its Economic Development Commission (hereinafter "EDC") to own and operate a plastic injection manufacturing facility, Special Plastic Products (hereinafter "SPP"). When the joint venture was formed, three agreements were executed: The Master Agreement, the Operating Agreement and the Employment Agreement. SPP failed, and Plaintiff Young requested arbitration on several issues: Count I – Breach of Contract – Joint Venture Master Agreement and SPP Operating Agreement: Count II – Dissolution and Winding Up of SPP

and NAB Group; and Count III – Breach of Employment Agreement. (First Amended Arbitration Claim).

The arbitration was held on January 21 through 23 and February 4, 1998. Closing statements and briefs were filed on or about March 2nd, 1998 and on March 3rd. The arbitrators indicated that the record was closed.

On February 19, 1998, Plaintiff brought the instant lawsuit to enter judgment on the arbitration award.

On April 10, 1998 the Award of Arbitrators was issued. The award provided: as to Count I – No cause of action and no damages awarded; Count II – Pending submission of further proofs; and Count III – Award to Ernest Young five hundred forty-six thousand three hundred fifty-one dollars and thirty-three cents against Tribe EDC and SPC, no award to Ernest Young and SPP against SPE and NAB Group; and as to counter-claim, no cause of action and no damages awarded.

Plaintiff filed a motion on April 22 to confirm the Arbitration Award, which was denied by this Court as premature. Plaintiff has since filed a Motion to Modify Award, a Motion to Confirm Modified Award and a Counter-Motion for Summary Disposition.

Defendants have filed a Motion for Summary Disposition and Sanctions, a Motion to Vacate or Modify Award, and a Motion for Summary Disposition on Counter-Claim to vacate or modify award.

This Court notes that this case is a procedural nightmare which arose because Plaintiff filed the initial action to enforce the award before the Arbitration Award had ever been issued. However, in the interest of judicial economy, this Court chooses not to dismiss the complaint without prejudice, as requested by Defendants, even though it was premature, since the Award has been issued and the parties have filed numerous pleadings in the matter, and the Court did have subject matter jurisdiction at the time the Complaint was filed.

The standard of review is as follows:

MCR 3.602(I) provides that an arbitration award...may be confirmed by the court unless it is vacated, corrected, or modified or a decision is postponed...

MCR 3.602(J) provides in relevant part that: 1) on application of a party, the Court shall vacate an award if: c) the arbitrator exceeded his or her powers. The fact that the relief could or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award. 3) In vacating the award, the Court may order a rehearing before a new arbitrator as provided in the agreement... If the award is vacated on grounds stated in subrule (J) (1) (c), the Court may order a rehearing before the arbitrator who made the award.

MCR 3.602(K) provides in relevant part: The Court shall modify or correct the award if: a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing or property referred to in the award; b) the arbitrator has awarded on a matter not

submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issue submitted; or c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

MCL 600.5001: (1) permits parties to submit disputes to arbitration, but requires that the submission be by an instrument in writing; (2) provides that an arbitration provision in a written contract shall stand as a submission to arbitration of any controversies between the parties to the contract.

MCR 2.116(C) (10) provides for summary disposition if there is no genuine issue of material fact. Affidavits, depositions, admissions or other documentary evidence must be submitted to support or oppose a (C) (10) motion. MCR 2.116 (G) (3) and (4). A (C) (10) motion tests whether a genuine issue of material fact remains upon which reasonable minds could differ. *Michaels versus Amway Corporation*, 206 Mich App 644, 649, 1994. In making this determination, the Court considers the evidence in favor of the nonmoving party. *Id.*

MCR 2.116 (C) (8) provides for summary disposition for failure to state a claim on which relief can be granted. The Court determines whether Plaintiff has a prima facie case based solely on Plaintiff's pleadings. *Garvelink versus Detroit News*, 206 Mich App 604, 607, 1994; MCR 2.116 (G) (5). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences which can be drawn from the facts. *ETT Ambulance versus Rockford Ambulance*, 204 Mich App 393, 395, 1994. Mere statements of conclusions unsupported by allegations of fact will not suffice

to state a cause of action. *Id.* Summary disposition is proper if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* at 396.

The analysis is as follows.

Suits against Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the Tribe or a congressional abrogation. The filing of a suit by a tribe does not waive the tribe's immunity with respect to counter-claims. *Huron Potawatomi versus Stinger*, 227 Mich App 127, 1997. A tribe's sovereign immunity extends to agencies and subordinate economic enterprises of the tribe. *Altheimer & Gray versus Sioux Manufacturing*, 983 F2d 803 (CA 7 (1993).

The Tribe EDC is a tribal entity chartered by the Tribe pursuant to Tribal Code section 44.102(5). As such, it is entitled to sovereign immunity unless it is clearly and unequivocally waived that immunity. The Master Agreement entered into between SPP, Plaintiff Young and the Tribe EDC provides that the parties shall form and operate at least three separate Limited Liability Companies with EDC and Young, each owning fifty percent. These Three entities are collectively referred to as the "Company." The Master Agreement contains Arbitration and Waiver of Sovereign Immunity and Consent to Suit clauses. The Arbitration provision provides:

> Any controversy or claim arising out of or relating to this Agreement or the breach of this Agreement shall be resolved by arbitration

administered by the office of the American Arbitration Association located in Oakland County, Michigan in accordance with its then current commercial arbitration rules. Except as provided in subsection (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

The waiver provision provides:

The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

> (a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;
>
> (b) the governing law shall be the law of the State of Michigan;

> (c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration) or to damages for breach of this Agreement by the EDC;
>
> (d) this waiver shall expire six years after the termination of the companies or successor entities; and
>
> (e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribe Tribal Code section 40.108 (1).

The Employment Agreement is one of the listed documents in the Master Agreement to be executed and delivered at Closing. The Employment Agreement was entered into between SPP, SPE, the NAB Group and Plaintiff Young. The Tribe EDC was not a party to the Employment Agreement. The Employment Agreement provides that "This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement."

Defendants argue that the employment claim against the Tribe EDC is barred by tribal sovereign immunity which was not waived. Defendants also argue that the award based on the Employment Agreement is beyond the scope of the

arbitrators authority because the Tribe was never a party to the Employment Agreement and never agreed to arbitrate employment claims.

The appropriate standard of review for determining whether arbitrators have exceeded the scope of their authority was set forth in *DAIIE versus Gavin*, 416 Mich 407, 1982, and more recently in *Gordon Sel-way versus Spence Brothers*, 438 Mich 488, 1991. In *Gavin*, the Supreme Court stated that a reviewing Court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record. Therefore, arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. Where it clearly appears on the face fo the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion and that, but for such error, a substantially different award must have been made, the award and decision will be set aside. The character or seriousness of an error of law that will require a court of law to vacate an arbitration award must be so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise. *Dohanyos versus Detres Corporation*, 217 Mich App 171, 175-176, 1996.

This Court, after a careful review of the briefs, exhibits and relevant case law, finds that the Tribe EDC clearly and unequivocally waived its sovereign immunity in the provisions of the Master Agreement. Pursuant to its

terms, this waiver encompassed all of the Agreements executed and delivered at closing, including the Employment Agreement.

Therefore, Defendants' argument based on sovereign immunity fails. Likewise, Defendants' argument concerning the agreement to arbitrate must fail. The Arbitration provision of the Master Agreement clearly provides that any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration. The Employment Agreement not only arises out of the Master Agreement, but is included as paragraph 9B of the Master Agreement.

Therefore, pursuant to the terms of the Master Agreement, the Defendants agreed to arbitrate the Employment Agreement.

Finally, this Court finds that there was substantial authority to support the finding of the arbitrators that Defendants breached the Employment Agreement and there is no basis for this Court to conclude that the arbitrators exceeded their powers in issuing the Award against the Tribe.

Therefore, Defendants Motion to Vacate or Modify the Arbitration Award Motion for Summary Disposition on Counter-Claim to Vacate or Modify Award and Motion for Summary Disposition and Sanctions are denied pursuant to MCR J.602(j) (1) and MCR 2.116(C) (8).

Plaintiffs Motion for Modification/Correction of Arbitration Award is granted pursuant to MCR 3.602(K) (1) (c). The second page of the Award of Arbitrators contains an

error in its summary paragraph. In order to correctly summarize the findings, it should read that: "This award is in full settlement of all Count I and Count III claims and counter-claims submitted by either party against the other in this arbitration. This award is inclusive of all costs, attorney fees, interest and reduction to present value. Count II claims are still pending."

Plaintiff's Counter-Motion for Summary Disposition and Motion for Confirmation fo the Modified Arbitration Award are granted pursuant to MCR 3.602(I) and MCR 2.116(C) (10).

In conclusion, it is hereby ordered that Defendants' Motion to Vacate or Modify the Arbitration Award Motion for Summary Disposition and Sanctions pursuant to MCR 3.602 (J) (1) and MCR 2.116 (C) (8) are denied.

It is hereby ordered that Plaintiff's Motion for Modification/Correction of Arbitration Award pursuant to MCR 3.602 (K) (1) (c) is granted.

It is hereby ordered that Plaintiff's Counter-Motion for Summary Disposition and Motion for Confirmation of the Modified Arbitration Award pursuant to MCR 2.602(K) and MCR 2.116 (C) (10) are granted.

I'll sign the appropriate order.

MR. GILLARY: Thank you, Your Honor. I've prepared a judgment on the modified arbitration award, if I can review it with counsel.

THE COURT: Show it to opposing counsel and present it to the Clerk.

MR. GILLARY: Thank you, Your Honor.

MR. MOODY: Thank you.

***

CERTIFICATE OF COURT REPORTER

I, PAMELA L. VOLL, an Official Court Reporter, do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that the same was later reduced to typewritten form by me, and that the foregoing transcript constitutes a true and correct transcription fo my stenographic notes so taken.

/s/ _____
PAMELA L. VOLL
OFFICIAL COURT
REPORTER
CSR 0195

APPENDIX 9

STATE OF MICHIGAN
COURT OF APPEALS

No. 214136

[Filed May 11, 2001]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs-Appellees/Cross-Appellants,

v

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, and SPECIAL PLASTIC PRODUCTS, L.L.C.,
Defendants-Appellants/Cross-Appellees,

and

SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,
Defendants.

JUDGES:
Before Collins, P.J., and Jansen and Whitbeck, JJ.

OPINION

PER CURIAM.

Defendants Sault Ste. Marie Tribe of Chippewa Indians and Special Plastic Products, L.L.C. appeal as of right the circuit court's confirmation of an arbitration award in favor of plaintiffs. On cross-appeal, plaintiffs challenge the circuit court's denial of statutory interest on the arbitration award. We affirm in part, reverse in part, and remand.

Plaintiffs and defendant Sault Ste. Marie Tribe of Chippewa Indians, d/b/a Sault Ste. Marie Economic Development Commission ("the Tribe EDC") entered into a joint venture to manufacture and supply plastic parts to the automotive industry pursuant to a Joint Venture Master Agreement (the "JVMA"). As a result of the joint venture, defendant Special Plastic Products, L.L.C. ("the LLC") was formed. Pursuant to an employment agreement ("the EA"), plaintiff Ernest I. Young became the chief executive officer of the LLC. After a period of time the LLC began experiencing financial difficulties and the managing board of the LLC terminated Young's employment. Young filed an arbitration claim seeking arbitration of, among other things, an alleged breach of the EA. The arbitrators awarded Young $546,351.33 against defendants the Tribe EDC and the LLC. The circuit court subsequently entered a judgment confirming the arbitration award.

Defendants argue on appeal that the circuit court erred when it confirmed the arbitration award because the arbitrators exceeded their authority when they entered the award against the Tribe EDC on Young's employment claim. Judicial review of an arbitration award is limited. *Dick v*

Dick, 210 Mich App 576, 589; 534 NW2d 185 (1995). In determining whether the arbitrators exceeded their authority in issuing an award, "a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996), citing *Detroit Automobile Inter-Ins Exchange (DAIIE) v Gavin, 416 Mich 407, 428-429; 331 NW2d 418 (1982).* Because the arbitrators' power arises from the parties' arbitration agreement, the arbitrators exceed their authority when "they act beyond the material terms of the contract from which they primarily draw their authority or in contravention of controlling principles of law." *Dohanyos, supra* at 176. Interpretation of the written contract is left to the arbitrators. *Konal v Forlini, 235 Mich App 69, 75; 596 NW2d 630 (1999).* Claims that the arbitrator made a factual error are beyond the scope of appellate review. *Id.*

Defendants acknowledge that the JVMA, which was signed by the Tribe EDC, contains an arbitration provision and a waiver of sovereign immunity,[1] but contend that the

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[1] Those provisions, in pertinent part, are as follows:

14.2 Arbitration.

(a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance

arbitrators did not have the authority to decide whether the

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with its then current commercial arbitration rules. Except as provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

* * *

14.3 Waiver of Sovereign Immunity and Consent to Suit.

The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, *and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement*, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

(a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the Companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108.1. [Emphasis added.]

Tribe EDC breached the EA because the Tribe EDC did not sign the EA and thus was not a party to that agreement. We conclude that this argument is not supported by the express terms of the JVMA and the EA. Where one writing refers to another, the two shall be construed together. *Culver v Castro,* 126 Mich App 824, 826; 338 NW2d 232 (1983), citing *Whittlesey v Herbrand* Co, 217 Mich 625, 628; 187 NW 279 (1922);[2] *see also Jenkins v USA Goods, Inc*, 912 F Supp 969, 971-972 (ED Mich, 1996) (where a promissory note was subject to the terms and conditions of a stock purchase agreement, and the stock purchase agreement included references to the promissory note and ancillary agreements, the stock purchase agreement, note, and ancillary documents "must be considered one agreement").

Under the plain language of the JVMA, that agreement is subject to the terms of the EA. Section 9 of the JVMA states in pertinent part as follows:

> **Implementation.** The promises and agreements of the parties are further

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[2] The Supreme Court noted in *Forge v Smith*, 458 Mich 198, 207 n 21; 580 NW2d 876 (1998):

In *Whittlesey v Herbrand Co, 217 Mich 625, 628; 187 NW 279 (1922),* quoting *Short v Van Dyke*, 50 Minn 286; 52 NW 643 (1892), the Court stated that "'in a written contract a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its content had been repeated in the contract.'"

> conditioned upon and *subject to the terms and provisions* of the following documents to be executed and delivered at Closing:
>
> * * *
>
> **B. Young Employment Agreement.** Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of $145,000 per year plus benefits, bonus of 2% for gross sales exceeding $12,500.00 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, *and upon the other conditions stated in an Employment Agreement*. [Emphasis added.]

Further, § 13.5 of the EA states that "this Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." Finally, as noted above, the immunity waiver in the JVMA specifically states that the Tribe EDC "waives its immunity from suit to enforce the provisions of [the JVMA], and all Agreements executed and delivered at Closing and/or pursuant to [the JVMA] . . . ." The plain language of the JVMA thus demonstrates that the parties intended that the JVMA and other documents "executed and delivered at

Closing," including the EA, be construed as one agreement.[3] Accordingly, a breach of the EA constitutes a breach of the JVMA, the claim of breach was subject to arbitration under the terms of the JVMA, and the Tribe EDC could be held liable for the breach.[4]

Defendants further argue that even if the Tribe EDC was subject to arbitration of Young's employment claim, the arbitrators exceeded their authority and erred as a matter of law in finding that defendants breached the EA. Defendants contend specifically that under the terms of the EA, the LLC was entitled to terminate Young because he was disabled and because he failed to perform his obligations as chief executive officer in good faith. Because this argument challenges the factual findings of the arbitrators, however, it is beyond the scope of our review. *Konal, supra* at 75.

We conclude that the arbitrators did not exceed their authority when they issued the arbitration award against the Tribe EDC for breach of the EA. Thus, the circuit court did

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[3] We find unpersuasive defendants' analogy to the insurance requirement in § 12.6 of the JVMA. The JVMA was not made subject to the terms and provisions of any insurance contracts required by that agreement, and insurance documents are not identified as documents to be executed and delivered at closing under § 9 of the JVMA.

[4] Because we conclude that under the terms of the JVMA and EA, the Tribe EDC agreed to submit employment disputes to arbitration, we need not address whether the arbitrators could find the Tribe EDC liable under a veil-piercing theory.

not err in confirming the arbitration award.

Plaintiffs argue on cross-appeal that the circuit court erred in refusing to include in the judgment entered an award of statutory interest from the date the arbitration award was issued through the date the judgment entered on the award is satisfied, pursuant to MCL 600.6013; MSA 27A.6013. We review a trial court's ruling concerning the award of statutory interest under MCL 600.6013; MSA 27A.6013 de novo. *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

In refusing to award postaward and postjudgment interest, the circuit court noted that the arbitrators had included interest in the arbitration award. It is well-settled that the issue of *preaward* interest is a matter solely within the arbitrators' discretion. *Holloway Construction Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996); *see also Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 501; 475 NW2d 704 (1991). However, "postaward, prejudgment interest and postjudgment interest under § 6013(1) are statutorily required." *Holloway Construction, supra*. Therefore, the circuit court should have granted plaintiffs' request for statutory interest pursuant to MCL 600.6013; MSA 27A.6013.[5]

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[5] We thus reject defendants' argument that under the Supreme Court's peremptory order in *Wiselogle v Michigan Mutual Ins Co*, 453 Mich 978; 557 NW2d 316 (1996), plaintiffs are not entitled to interest because interest is an element of damages properly determined by the arbitrators, not the courts. We conclude that this order is not controlling with regard to the issue before this

We reject defendants' argument that its waiver of sovereign immunity, even if it applies to claims of breach of the EA, does not apply to awards of postaward and postjudgment statutory interest. As noted above, the JVMA states that the law of Michigan governs the Tribe EDC's waiver of sovereign immunity and that the waiver extends to *the enforcement* of the Tribe EDC's obligations under the JVMA. Again, under the laws of Michigan, statutory interest is mandatory in civil actions seeking confirmation of an arbitration award. *Holloway Construction, supra.* Accordingly, the Tribe EDC's waiver of sovereign immunity extends to an award of statutory interest.

We likewise reject defendants' argument that plaintiffs are not entitled to any postaward interest because they filed their complaint seeking confirmation of the arbitration award before the award was made. While the filing was premature, the circuit court entered the judgment nonetheless, as allowed by MCR 3.602(I).[6] Further, there is not, as defendants

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Court because the scope of the order is uncertain given the authority cited. *See Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61-62; 613 NW2d 733 (2000) ("Supreme Court peremptory orders are binding precedent when they can be understood."). Neither *Gordon Sel-Way, supra* nor *Holloway Construction, supra* state that postcomplaint interest is to be determined by the arbitrators. Rather, as discussed above, those cases make clear that the determination of any preaward interest is for the arbitrators, but postaward statutory interest is determined by the court.

[6] Defendants do not raise in their appeal the issue whether, given the premature filing, the lower court had jurisdiction to enter judgment on the award.

contend, a danger that application of MCL 600.6013; MSA 27A.6013 will result in double recovery, as preaward interest is determined solely by the arbitrators and § 6013 applies only to postaward interest. *Holloway Construction, supra.* Plaintiffs are, therefore, entitled to an award of statutory interest from the date the award was issued until the judgment is satisfied.

Plaintiffs' last argument on cross-appeal is that they are entitled to the twelve percent interest provided for in *MCL 600.6013(5)*; MSA 27A.6013(5) because the arbitration award was rendered on a written instrument, i.e., the EA. Defendants contend that if plaintiffs are entitled to interest, they are entitled only to the variable rate provided for in *MCL 600.6013(6)*; MSA 27A.6013(6) because the judgment at issue was not rendered on a written instrument but was entered on a complaint to confirm an arbitration award.

> MCL 600.6013; MSA 27A.6013 provides in pertinent part:
>
> (5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year, compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year

> compounded annually after the date judgment is entered.
>
> (6) Except as otherwise provided in subsection (5) . . . , for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury note during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

In *Yaldo v North Pointe Ins Co*, 457 Mich 341, 350; 578 NW2d 274 (1998), the Supreme Court held that an insurance contract is a "written instrument" for purposes of determining postcomplaint interest pursuant to MCL 600.6013; MSA 27A.6013; thus, interest on the judgment rendered on that contract was properly determined under § 6013(5). The Court concluded that at least one reason for awarding a fixed rate of interest to judgments on written instruments, as opposed to a fluctuating interest rate on judgments in other civil actions, is a preexisting relationship between the parties before a controversy arises. *Id.*; *see also Everett, supra at* 639 (where a written instrument existed and governed the parties' relationship, plaintiff entitled to interest under § 6013[5]).

Here, the parties' relationship clearly was governed by a written contract, and the arbitrators found defendants liable for breach of that contract. Although technically the judgment was *entered* pursuant to a complaint seeking confirmation of an arbitration award, the arbitration award that served as the basis for the judgment was rendered on a written instrument. Indeed, § 14.2 of the JVMA provides that "judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction." We conclude therefore that the judgment entered pursuant to the complaint to enforce the arbitration award was a judgment rendered on a written instrument. *See Jones v Jackson National Life Ins Co*, 819 F Supp 1382, 1384 (WD Mich, 1993) (judgment "rendered on a written instrument" is one that enforces a written instrument). Accordingly, Young is entitled to interest calculated under § 6013(5).

Affirmed in part, reversed in part, and remanded for modification of the judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck

APPENDIX 10

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 120110
CA-6: 00-1267
ED Mich: 98-CV-72966-DT

[Entered April 20, 2002]

IN RE CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH HENES SPECIAL PROJECTS, PROCUREMENT, MARKETING AND CONSULTING CORPORATION,

Plaintiff-Appellee,

v.

CONTINENTAL BIOMASS INDUSTRIES, INC.,

Defendant-Appellant.

ORDER

On order of the Court, the question certified by the United States Court of Appeals for the Sixth Circuit is considered, and the request to answer the question is GRANTED. If the parties with to file further briefs, they must be prepared in conformity with MCR 7.306 through 7.309.